such further or other relief as to this Court may seem proper.

Respectfully submitted,

O. O. OWENS,
Petitioner, Pro Se.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinions of the Court Below.

A written Memorandum Opinion was rendered by the Board of Tax Appeals (Rec. 468-481), but same is not included in reported B. T. A. cases. The opinion of the Circuit Court of Appeals (Rec. 645-652) is reported in 125 F. (2d) 210-213.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this Court were stated under Paragraph II of the Petition for Writ of *Certiorari.*

III.

Statement of the Case.

This has been fully covered under "I" in the Petition for Writ of *Certiorari* and, in the interest of brevity, is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in not reviewing the opinion of the Board of Tax Appeals.

2. The Circuit Court of Appeals erred in rendering an opinion and decision based upon questions of fact and law

expressly excluded by the Board of Tax Appeals from its consideration.

3. The Circuit Court erred in sustaining the decision of the Board of Tax Appeals.

4. The Circuit Court erred in holding that the money transferred to Martha Jackson by petitioner in 1920, to expedite distribution of impounded income (with title thereto adjudicated and possession thereof awarded by final decree unappealed from), was capital "outlay"—or, in substance, capital investment in such property, and therefore not deductible.

5. The Circuit Court erred in not holding that the funds transferred by petitioner in 1920 to Martha Jackson was an expense sustained in the usual course of business to expedite distribution of petitioner's impounded income and, on either cash or accrual basis of reporting income, was, therefore, deductible as expense in determining petitioner's net taxable income for 1920.

6. The Circuit Court erred in not holding that the payment made by petitioner in 1920 to Martha Jackson, to expedite distribution of his impounded income, was an expense that resulted in a loss—and in not holding that such loss resulted from the Secretary's efforts to enforce his void order of May 6, 1920, purporting to require the Black Panther Company to pay to Martha Jackson royalty under the terms of an oil and gas lease under which no oil or gas had been produced—and in not holding that McKinney's appeal from court order denying him leave to intervene, and the Secretary's Order, and his and McKinney's efforts to enforce the same, created no contingency on petitioner's ownership of his portion of the impounded funds and created no contingency on petitioner's payment to Martha Jackson in 1920,—but that said order, and the Secretary's efforts to enforce the same, constituted a nuisance and an impediment

and prevented distribution to petitioner of his impounded income—and in not holding that payment by petitioner and his associates, instead of by the Black Panther Company as demanded by the Secretary, to Martha Jackson to prevent further delay in such distribution contained none of the elements of capital investment or capital "outlay," and that such payment was, therefore, deductible in 1920 as a loss since petitioner was legally entitled to distribution without having to make such payment by transfer of his impounded funds.

V.

ARGUMENT.

Following is a summary of the points which will be argued:

(1) As ground for this Court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919, (and unappealed from) of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of the Secretary—in consequence of which facts the opinion and decision of the Tenth Circuit Court of Appeals, holding that such payment was capital "outlay" (or investment) and therefore not deductible, is in direct conflict with the decisions of other courts, *viz:*

First Nat. Bank in Wichita v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283;

Newark Milk & Cream Co. v. *Commissioner,* (C. C. A. 3) 34 F. (2d) 854;
Anahma Realty Corporation v. *Commissioner,* (C. C. A. 2) 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854;
King Amusement Co. v. *Commissioner,* (C. C. A. 6) 44 F. (2d) 709, *certiorari* denied, 282 U. S. 900;
Athol Mfg. Co. v. *Commissioner,* (C. C. A. 1) 54 F. (2d) 230;
Newspaper Printing Co. v. *Commissioner,* (C. C. A. 3) 56 F. (2d) 125;
Falk Corporation v. *Commissioner,* (C. C. A. 7) 60 F. (2d) 204;
Home Trust Co. v. *Commissioner,* (C. C. A. 8) 65 F. (2d) 532;
Clark Thread Co. v. *Commissioner,* (C. C. A. 3) 100 F. (2d) 257,

cited in support of its decision. Said decision is also in direct conflict with the following decisions of this Court and other Circuit Courts, to-wit:

On Allowable Expense Deduction.

Kornhauser v. *United States,* 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505;
Bliss v. *Commissioner,* (C. C. A. 5) 57 F. (2d) 984;
Commissioner v. *Wurts-Dundas,* (C. C. A. 2) 54 F. (2d) 515;
Lucas v. *Wofford,* (C. C. A. 5) 49 F. (2d) 1027;
Atwater-Kent Mfg. Co. v. *Commissioner,* (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner,* (C. C. A. 3) 44 F. (2d) 147;
Illinois Central Co. v. *Commissioner,* (C. C. A. 7) 90 F. (2d) 461.

On Allowable Loss Deduction.

F. W. Darling v. *Commissioner,* (C. C. A. 4) 49 F. (2d) 111;

Dayton Co. v. *Commissioner,* (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas,* (C. C. A. 9) 44 F. (2d) 528;
United States v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Commissioner v. *Brown,* (C. C. A. 1) 54 F. (2d) 569-570;
Rhodes v. *Commissioner,* (C. C. A. 1) 100 F. (2d) 966.

(2) The Circuit Court did not review or consider the Board's Memorandum Opinion in support of its decision, which Memorandum Opinion erroneously decides the questions:

PROPOSITION I. "Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof had been awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,

"Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income,* in the year the funds were transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties, each claiming the right to act as trustee for transferee, and receive the trans-

ferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties."

PROPOSITION II. "Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in and awarding possession to others of such property and impounded income or funds—by appealing from an order of the trial court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

"Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trustee,"—but said Circuit Court rendered its opinion upon a question of fact not decided by the Board, and upon a question of law, without deciding it, expressly not considered by the Board.

(3) The Circuit Court's opinion and decision herein

should be reversed and Propositions I and II should be decided by this Court to eliminate conflict in the opinion and decision herein of the Tenth Circuit Court with the opinions of other Circuit Courts of Appeals and of this Court, and to eliminate great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in the construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals.

Point 1.

As ground for this court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the Receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919 (and unappealed from), of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of the Secretary—in consequence of which facts the opinion and decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of other courts mentioned in point (1) of "summary" of Argument on pages 28 and 29 hereof.

In the Circuit Court's opinion (Rec. 650) appears this conclusion and decision:

> "But whatever may have been the basis of the return, accrual or cash, the amount transferred, relinquished and assigned to Martha was a capital outlay and therefore was not deductible under Section 214, *supra*, either as business expense or a loss. *First Nat. Bank in Wichita* v. *Commissioner*, 46 F. (2d) 283; *Newark Milk & Cream Co.* v. *Commissioner*, 34 F. (2d) 854; *Anahma Realty Corporation* v. *Commissioner*, 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854; *King Amuse-*

ment Co. v. *Commissioner,* 44 F. (2d) 709, *certiorari* denied, 282 U. S. 900; *Athol Mfg. Co.* v. *Commissioner,* 54 F. (2d) 230; *Newspaper Printing Co.* v. *Commissioner,* 56 F. (2d) 125; *Falk Corporation* v. *Commissioner,* 60 F. (2d) 204; *Home Trust Co.* v. *Commissioner,* 65 F. (2d) 532; *Clark Thread Co.* v. *Commissioner,* 100 F. (2d) 257."

In the case of *First National Bank in Wichita* v. *Commissioner, supra,* first cited by the Circuit Court in support of its decision, a stockholder in a bank transferred capital from one account to another. He transferred additional cash to the credit of bank stock previously purchased and thereafter retained by him.

Such transfer resulted from re-classification by a bank examiner of the bank's assets which determined an impairment of the bank's capital. The bank retained all its assets, re-classified. The bank's assets and the stockholder's interest therein remained unchanged, although re-classified. From a tax standpoint the stockholder occupied the same position as a farmer who transfers grain from a defective or deteriorating granary to a better one for the purpose of protecting the grain while repairing the emptied granary. The bank stockholder parted with nothing. Like the farmer transferring his grain from one granary to another, the bank stockholder preserved his capital. The facts of the cited case are not similar, and the legal principle announced has no applicability to the instant case.

None of the other cases cited by the Circuit Court in its opinion are in point as to the facts or the legal issues involved in the instant case. Without exception, the taxpayer in each of the other eight cases cited by the Circuit Court sought to claim as a business expense or a loss deduction an amount specifically provided in the original contract of purchase, or by the terms of acquisition of property, a part of the purchase price of, or cost of, or investment in, capital assets.

Here the capital assets (petitioner's interest in the Thlocco estate and impounded income thereof) had been previously purchased with funds other than those claimed as a deduction. Conveyance of the property and impounded funds had been made, title had been quieted and perfected and possession of the impounded funds was awarded by final decree, unappealed from, of a court of competent and exclusive jurisdiction, but distribution of such impounded income had been prevented by the arbitrary conduct of the Secretary in his efforts to force the Black Panther and Bay State Companies to pay royalty to Martha Jackson under the terms of an oil and gas lease based upon a claim to title (and under the terms of which lease no oil or gas had been produced) and notwithstanding Martha Jackson had sold to petitioner and his associates her claim to the entire estate (which included any royalty that might have accrued to her credit had the property been developed and oil produced under the terms of such lease)—all of which is clearly demonstrated by the following:

In 1913, Saber Jackson and the guardian of Martha Jackson, respectively executed oil and gas mining leases, each providing for one-eighth royalty, covering the Thlocco allotment. Those leases had been assigned to the Black Panther Company, but that company had not been permitted to develop the property under such leases. Instead, a lease for one-fourth royalty and for the duration of the receivership only, had been made by the Receiver, with court approval, to the Black Panther Company. (Rec. 195, 633) All royalty revenue accumulated by the Receiver was derived from oil and gas produced under such Receiver's lease. (Rec. 197, 199, 633, 634)

(Nevertheless, long after Martha Jackson had legally sold and conveyed to petitioner her unadjudicated and unestablished claim to the Thlocco estate and all income therefrom then or thereafter impounded by the Receiver, and

petitioner's title thereto had been finally adjudicated and possession of such impounded income had been awarded to petitioner by final decree, unappealed from, of a court of competent and exclusive jurisdiction, the Secretary, by his order of May 6, 1920, attempted to require the specific performance *by the Black Panther Company* of the royalty payment provisions of the Martha Jackson lease—(by demanding payment by that company to Martha Jackson of royalty accumulated by the Receiver under the Receiver's lease) to the date of her sale to petitioner of her unadjudicated and unestablished claim to the property.)

After the validity of the patent was sustained and petition for rehearing denied, February 11, 1918, by the Supreme Court (Rec. 197, 199, 633, 634), the Black Panther Company, for the purpose of retaining a leasehold estate without excessive royalty in the property after the owners of the allotment were ascertained and the Receiver discharged, entered into the contract of February 26, 1918, with petitioner and associates (Rec. 197-199) which provided for the purchase of and merging all claims asserted against the estate of Thlocco.

There had been no judicial determination of Thlocco's heirship and ascertainment of his heirs. The Black Panther Company, by that contract, recognized the fact that the identity of Thlocco's heirs could not be definitely and judicially established. (Ex. 20; Rec. 633, 634) By that contract the Black Panther Company recognized petitioner and his associates as the *owners* of the allotment and funds then and thereafter impounded; agreed to perfect petitioner's and his associates' title at its sole and exclusive expense; guaranteed the payment to, and receipt by, petitioner and associates of one-half the funds held by the Receiver at final distribution, and after discharge of the Receiver the payment to petitioner and associates of the royalty of one-eighth of the oil and gas produced from the Thlocco allot-

ment, "free from any claim" upon such royalty by that company, in consideration of the assignment and conveyance by petitioner and associates of the Saber Jackson "claim" and their releasing to that company all claim to the remaining half of the funds then and thereafter impounded by the Receiver. (Rec. 197-199)

By that contract the Black Panther Company assumed the burden and cost of purchasing all claims, except those of Martha Jackson and Saber Jackson which petitioner and associates had previously purchased, and merging them with the Martha Jackson claim—or of defeating all claims which could not be purchased. *That contract provided for and guaranteed the creation by purchase, compromise and settlements of an estate in Martha Jackson, and through her and her prior sale of her unestablished and unadjudicated claim, the perfection of petitioner's and associates' title to one-half the impounded funds and one-eighth royalty after discharge of the Receiver.*

By their contract of February 26, 1918, the parties recognized, and at all times thereafter treated and considered, the impounded funds as being separated or apportioned into two equal portions (halves)—one, the Martha Jackson half, which the Black Panther Company agreed and guaranteed should, at the discharge of the Receiver, be paid to and received by petitioner and his associates; and the other, the Saber Jackson half, upon which all claims by petitioner and associates were released to the Black Panther Company. Such impounded funds were also thereafter treated as two separate portions (halves) by all others, including the court in its supplemental decree of September 9, 1919, adjusting the equities between the parties, and also by the Secretary in making and attempting to enforce his void order of May 6, 1920.

The contract of May 11, 1918, did not change the con-

sideration or the purchase price paid and to be paid to Martha Jackson. It only construed the purchase contract by fixing the amount due Martha Jackson thereunder as at the latest possible date (March 31, 1918) for which records of accumulations by the Receiver were available, and contained additional provisions designed to guarantee the performance of the purchase contract, as well as the contract of February 26, 1918, between petitioner and associates and the Black Panther Company.

In interceding on behalf of Martha Jackson, and aiding Parmenter in procuring the construing contract of May 11, 1918 (Jt. Ex. A-1, Rec. 294-297), the Secretary's agents, representatives and subordinates proceeded under Section 6 of the Act of Congress of May 27, 1908, 35 Stat. 312, empowering the Secretary to supervise the administration in probate of the estates of minor allottees:

> "*Sec. 6.* That the persons and property of *minor allottees* of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that state or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, * * *."

In procuring such contract, the Secretary's agents, subordinates and representatives did not proceed under Section 9 of the Act of May 27, 1908, 35 Stat. 312, which, in part, provides:

> "*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of *any interest of any full-blood*

Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: * * *."

Thlocco's estate was unrestricted in the sense and to the extent that the leasing or the conveyance after July 27, 1908, the effective date of the aforesaid act, of his allotment by *any full-blood Indian heir or claimant* did not require approval by the Secretary, but only by the County Court having jurisdiction of the estate of the decedent.

Saber Jackson's deed, executed in 1916, *of his unestablished and unadjudicated claim* required only the approval of the County Court of Okfuskee County.

—*United States* v. *Gypsy*, 10 F. (2d) 487;
Graves Farm Loans. Inv. Co. v. *Deck*, 118 Okl. 18, 246 Pac. 397;
Eysenbach v. *Naharkey*, 110 Okl. 207, 236 Pac. 619;
MaHarry v. *Eatman*, 29 Okl. 46, 116 Pac. 935;
Harris, Gdn., v. *Gale*, 188 Fed. 712;
United States v. *Knight*, 206 Fed. 145;
Brown v. *Minshall*, 83 Okl. 98, 202 Pac. 1037;
Baird v. *England*, 85 Okl. 276, 205 Pac. 1098;
Hays v. *Wood*, 110 Okl. 45, 236 Pac. 3;
Aldrich, et al., v. *Crockett*, 118 Okl. 215, 249 Pac. 143;
Pritchett v. *Jenkins*, 111 Okl. 30, 238 Pac. 484;
Gypsy Oil Co. v. *Clinton*, 98 Okl. 282, 220 Pac. 587;
Wolf v. *Gills*, 98 Okl. 6, 219 Pac. 350;
Carey v. *Bewley*, 101 Okl. 235, 224 Pac. 990;
Dierks v. *Isaac*, 114 Okl. 158, 244 Pac. 750;
Terrell v. *Scott*, 129 Okl. 78, 262 Pac. 1071;
Potter v. *Vernon*, 129 Okl. 251, 264 Pac. 611;
Schmidt v. *Durant*, 136 Okl. 56, 276 Pac. 218;
Harris v. *Bell*, 41 S. Ct. 49, 254 U. S. 100, 65 L. ed. 159.

Martha Jackson's sale and conveyance of July 9, 1917, of *her unestablished and unadjudicated claim* required only the approval of the County Court of Seminole County. Had

Martha Jackson been, and had she subsequently been decreed to be, the sole heir of Thlocco, her conveyance required approval only by the Seminole County Court.

—*Harris* v. *Bell,* 254 U. S. 100, 41 S. Ct. 49, 65 L. ed. 159, and cited cases.

The contract of May 11, 1918 (Ex. A-1; Rec. 294-297), required only the approval of the County Court of Seminole County. *Harris* v. *Bell, supra.* That contract specifically provided for the settlement and compromise of all controversies affecting the ownership of Thlocco's estate and, notwithstanding the agents, representatives, subordinates of the Secretary were permitted, under Section 6 of the Act of Congress of May 27, 1908, *supra,* to collaborate with Parmenter as Martha Jackson's guardian, she being then a minor, in making and approving such contract, had Martha Jackson been, and had she subsequently been decreed to be the owner by inheritance of Thlocco's estate, that contract required only the approval of the County Court of Seminole County.

—*Carter Oil Co.* v. *Fleming,* 117 Okl. 239, 245 Pac. 833;
Harris v. *Davis,* 170 Okl. 35, 38 P. (2d) 562;
Derrisaw v. *Shaffer, et al.,* 8 Fed. Sup. 876.

When the claims of all defendants and intervenors (and many others who had not intervened) had been acquired in 1918 at the expense of the Black Panther Company, and conveyed to petitioner and associates, their title to the Thlocco estate and impounded funds was complete and vested. The claim proven and demonstrated in the trial in December, 1918, to be fraudulent (Rec. 267), was not a "claim," but only a "cloud." No appeal was perfected by such claimant from the court's decree that his claim was fraudulent.

On October 7, 1918, petitioner, Brazell and Johnson by deed to the Black Panther Company (Rec. 199), as provided

by their contract of February 26, 1918 (Rec. 197-199), conveyed Saber Jackson's claim as consideration for the performance by that company of such contract. They thereby recognized their title to be complete and perfect, and to have been made so by the Black Panther Company. They thereby recognized the "cloud," subsequently proven to be fraudulent in the December, 1918 trial (Rec. 199), to be worthless, and approved and accepted their title to the Martha Jackson half of the funds then and thereafter impounded and to the future one-eighth royalty after discharge of the Receiver.

The decree of June 17, 1919, quieted and perfected the title theretofore created by purchase, settlements and compromises in Martha Jackson, and through her, as trustee and conduit of title, in petitioner, Brazell and Johnson. That decree fixed as the amount due Martha Jackson the consideration provided in her sale contract of July 9, 1917, construed by the later contract of May 11, 1918. That decree did not adjudge Martha Jackson to be the "sole heir." (Ex. B-2; Rec. 297-309)

Saber Jackson's Claim.

The record reveals that Saber Jackson, as the father of Martha Jackson, claimed a life estate as tenant by the curtesy. This implied that descent was cast under the Arkansas law and on or after July 1, 1902, when chapter 49 of Mansfield's Digest of the Arkansas Laws, in respect of descent and distribution, was put in force in the Creek Nation. 32 Stat. 245; 33 Stat. 573; *Marx* v. *Hefner,* 46 Okl. 453, 149 Pac. 207. The Arkansas laws created and recognized an estate by the curtesy. For Saber Jackson to enforce an "estate by the curtesy" claim, he would, under Mansfield's Digest of the Arkansas Laws, have had to establish not only that descent to Martha Jackson was cast under the Arkansas

laws, but also that Martha Jackson was of the blood of Barney Thlocco.

—*Kelly's Heirs* v. *McGuire*, 15 Ark. 555;
Loftis v. *Glass*, 15 Ark. 680;
Scull v. *Vangine*, 15 Ark. 695;
Galloway v. *Robinson*, 19 Ark. 396;
Bird v. *Lipscomb*, 20 Ark. 19;
Moss v. *Ashbrooke*, 20 Ark. 128;
Campbell v. *Ware*, 27 Ark. 65;
Beard v. *Moseley*, 30 Ark. 519;
Magness v. *Arnold*, 31 Ark. 103;
Bozeman v. *Browning*, 31 Ark. 376;
Oliver v. *Vance*, 34 Ark. 564;
Kountz v. *Davis*, (1881) 34 Ark. 596;
Palmer v. *King*, 75 Okl. 276, 183 Pac. 411;
Roberts v. *Underwood*, 38 Okl. 376, 132 Pac. 673, 237 U. S. 386, 59 L. ed. 1007;
Marlin v. *Lewellen, et al.*, 276 U. S. 58, 48 S. Ct. 248, 72 L. ed. 467;
Thompson v. *Smith*, 102 Okl. 150, 227 Pac. 77;
Joines v. *Patterson*, 274 U. S. 544, 47 S. Ct. 706, 71 L. ed. 1194;
Roubedeaux v. *Quaker Oil & Gas Co. of Oklahoma*, 23 F. (2d) 277;
McDougal v. *McKay*, 43 Okl. 261, 142 Pac. 987, 237 U. S. 372, 59 L. ed. 1001;
Shulthis v. *McDougal*, 170 Fed. (C. C. A.) 529, 229 Fed. (C. C. A.) 872;
Thorne v. *Cone*, 47 Okl. 781, 150 Pac. 701;
Finlay v. *Amer. Trust Co.*, 51 Okl. 489 151 Pac. 865;
Cowokochee v. *Chapman*, 67 Okl. 263, 171 Pac. 50;
Buck v. *Simpson*, 65 Okl. 265, 166 Pac. 146;
Johnson v. *Dunlap*, 65 Okl. 216, 173 Pac. 359;
Finley v. *Thompson*, 68 Okl. 250, 174 Pac. 535;
Dailey v. *Benn*, 81 Okl. 285, 198 Pac. 323;
Moroney v. *Tannehill*, ... Okl...., 215 Pac. 938;
Stalcup v. *Mullen*, 49 Okl. 543, 153 Pac. 868;
Gillum v. *Anglin*, 44 Okl. 634, 144 Pac. 1145.

Martha Jackson was not of Thlocco's blood. She was

the child of Thlocco's daughter-in-law, Annie or Annie Nevey, by her marriage to Saber Jackson after the death of her first husband, John, who was Thlocco's son. (Ex. 20, Rec. 634)

Title by purchase, compromise and settlement.

In other words, title by purchase, compromises and settlements, was created and established in Martha Jackson and through her, as provided by her contracts, in petitioner and associates, and that title was quieted and perfected by the final decree of the United States District Court for the Eastern District of Oklahoma rendered *June 17, 1919.* (Rec. 297-309)

In that decree (Ex. B-2, Rec. 305) the court held and decreed that petitioner and associates were the owners of and entitled to possession of the Thlocco allotment and all funds then and thereafter impounded by the Receiver:

> "*(1)* Save and except the necessary expenses of said receivership and the administration thereof;
>
> "*(2)* Subject to the claim of Martha Jackson for the sum of One Hundred Eleven Thousand Six Hundred Seventy Dollars and Seventy-four cents ($111,670.74) plus 25% of one-eighth of the proceeds derived from said lands between the 31st day of March, 1918, *and this date,* the foregoing amount, however, to be paid to Martha Jackson to be subject, as heretofore set out in this decree to her proportionate part of the expense and charges herein detailed, said proportionate part being one-eighth (1/8) of the *entire expenses.*" (Italics ours.)

The amount thus decreed to Martha Jackson was the amount provided under her sale contract of July 9, 1917, as construed by the contract of May 11, 1918, to March 31, 1918 (the last date upon which definite figures were available on May 11, 1918).

From the record it is abundantly clear Martha Jackson

was decreed the definite sum of money for which her legal guardian, with approval of the proper County Court, had on July 9, 1917, sold her *unestablished and unadjudicated* claim and for her acting as conduit of title and trustee in merging and consolidating all claims; and that there was no condition or provision in her sale contract or the final decree by which she reserved title to any portion of the impounded funds. On the contrary, *the impounded funds were used as a yardstick or standard of measurement to determine the amount Martha Jackson should be paid*, and not any amount she reserved as the heir or the owner.

Under the settled law, she was entitled to no royalty, notwithstanding her lease. Under her sale contract and deed, she conveyed to petitioner and his associates all rights to royalty asserted or created by her lease.

Saber Jackson's appeal.

Saber Jackson had legally sold his *unestablished* and *unadjudicated* claim. Creating, by purchase, compromises and settlements, an estate in Martha Jackson for the purpose of making her deed and sale contract to petitioner and associates convey all the title to the estate and impounded income, did not create an "estate by the curtesy" in Saber Jackson. That claim had been so referred to only for the purpose of settlements and compromises in perfecting the title.

Saber Jackson was heard upon his petition to intervene, not because of the validity of his claim to an estate by the curtesy, but because he asserted he had been unfairly dealt with in his sale in 1916 of his unadjudicated and unestablished claim. (Rec. 309) The court did not disturb the final decree. After a hearing on Saber's intervening petition the court denied the same, which left the decree undisturbed and final. From the order denying his intervention, Saber appealed. (Rec. 200)

That appeal did not affect petitioner and his associates because they had previously, by their contract of February 26, 1918 (Rec. 197-199), released to the Black Panther Company all claim to one-half of (the Saber half) the money impounded by the Receiver, and by their deed of October 7, 1918 (Rec. 199), had conveyed, without warranty, the "Saber claim," to that company.

The Black Panther Company had guaranteed the payment to and receipt by petitioner and his associates of the other half of the impounded funds. Had Saber prevailed on intervention or appeal, petitioner and his associates would not have been affected by the consequences. Their title had been guaranteed by the Black Panther Company. It had been completed by purchases, compromises and settlements at the Black Panther Company's expense. Had Saber prevailed, only the Black Panther Company would have been affected. In that event, the Black Panther Company would have been required, under the prior contracts and to protect its own interests, to repurchase the claim of Saber Jackson.

However, had Saber's intervention been allowed, he would have been confronted with establishing Martha Jackson as the heir of Thlocco in order to establish his claim of "an estate by the curtesy," which he could not do. (Ex. 20, Rec. 634) *Kelly's Heirs* v. *McGuire*, 15 Ark. 555, and other cited cases, *supra*. The estate had been created by purchase. It had not been inherited by her. She at best, was trustee for merging all claims to the Thlocco estate and no life tenancy could attach for Saber Jackson to property and funds for which Martha Jackson was trustee.

McKinney's appeal.

McKinney's petition for leave to intervene was a nullity. His appeal from the order denying him leave was also null. Having been held by the Oklahoma Supreme Court to

have been illegally appointed (Ex. 20, Rec. 631, 640, 641), McKinney had no standing. Furthermore, he was attempting to intervene in a representative capacity for Martha Jackson, whose legal guardian had legally sold her *unestablished and unadjudicated claim* with the approval of the proper County Court, and with the later approval of the Secretary's agents and subordinates, under the provisions of Section 6 of the Act of May 27, 1908, *supra.* (Ex. 20, Rec. 637-638)

When McKinney was held by the opinion of the Oklahoma Supreme Court, rendered March 29, 1921, to have been illegally appointed and was prohibited, any question created by McKinney became not only moot—but such opinion also determined that he at no time before or after rendition of such opinion had any right to pretend to represent Martha Jackson, to intervene or to appeal. Consequently nothing McKinney did affected the decree or created a contingency on petitioner's ownership of the funds—nor created a contingency on payment made by assigning, transferring and relinquishing those funds.

Parmenter, the legal guardian, recognized the decree of June 17, 1919, as valid, binding and conclusive. McKinney was wholly without authority to act and, as stated by the court in *McKinney* v. *Black Panther Company, supra,* "Neither of them has a personal interest in this controversy; it was Martha's interest that was being dealt with. Parmenter appeared and was recognized by the court below in a representative capacity only, as Martha's guardian, and is estopped to deny or question that he appeared in that capacity." (Rec. 631, 640, 641)

Parmenter not only recognized the decree as valid, binding, conclusive and final, but procured from the Supreme Court of Oklahoma the writ against not only the County Court of Okfuskee County which appointed McKinney, but also against McKinney himself, prohibiting further interference with distribution provided by the court's decrees.

Under those circumstances McKinney's appeal from the order denying him leave to intervene was only a nuisance, and quite clearly intended by McKinney to create an impediment and obstacle to distribution of the impounded funds.

The record clearly demonstrates (Pet. Ex. 5 to 11, incl.; Rec. 314-325) that for the purpose of continuing his nuisance, McKinney, through his attorney Swift, enlisted the cooperation and assistance of the Secretary and collaborated with the Secretary's agents and subordinates in his efforts to prevent distribution. (Rec. 325)

The Secretary's "Judgment" and Order.

The Secretary promulgated his "judgment" and order of May 6, 1920 (Pet. Ex. 5; Rec. 314-317), in response to an application filed by the Black Panther and Bay State Companies for the approval of the Jackson leases made in 1913.

While those companies had never been permitted to develop or operate the property under either of the Jackson leases, they sought, as a matter of precaution, to have such leases approved because of a recent decision by the United States Supreme Court in the case of *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954. Such application for approval was not a recognition on the part of those companies of the jurisdiction and supervisory control by the Secretary over the Thlocco estate. The companies, by applying for the Secretary's approval, could not and did not create nor confer upon the Secretary jurisdiction which the law did not provide. Such application for approval was purely a precaution to protect the leasehold interest after discharge of the Receiver from additional frivolous attacks, and had nothing whatever to do with the royalty.

In his "judgment" and order the Secretary stated that the application for approval *of the contract of May 11, 1918,*

was withdrawn. The Secretary, having no jurisdiction over the leases, admittedly had no jurisdiction whatever over that contract, or the prior sale contract of July 9, 1917. *United States* v. *Gypsy Oil Co., supra,* and cited cases.

The only possible reason the Secretary might have had for exercising jurisdiction to approve those leases was a misinterpretation and misconception by the companies and by the Secretary of the legal principle announced in *Parker* v. *Richard, supra.*

In that case the Supreme Court held, that under the provisions of the departmental form lease under which the Richard land had been developed for oil and gas, and under the leasing regulations promulgated by the Secretary, the restrictions upon the allotments of full-blood allottees, leased and developed under the supervision of the Secretary of the Interior, were not released upon the death of the allottee but *relaxed;* that the Secretary had no jurisdiction over the sale by the full-blood heirs of the decedent's allotment and the royalty accumulated thereafter, but that the restrictions on the prior royalties, accumulated under his supervision and held by the Secretary of the Interior, continued.

In the instant case no such condition existed. The land had not been previously leased under the Secretary's supervision, nor subject to his approval. No oil had been produced under his supervision. No money had accumulated subject to his supervisory control. *Not one barrel, nor one dime's worth, of oil had been produced under the Jackson leases. The Secretary, as the moving party, prevented those leases, if valid, being enforced.*

The Secretary had instituted the suit to cancel the Thlocco allotment, had procured, with the consent of adverse parties, the appointment of a Receiver. The development of the property and the production of oil was exclusively un-

der the Receiver's lease and the trial court's supervision. The Secretary lost his suit, and was as effectively bound by the court orders and decrees as the other parties thereto.

—*United States* v. *Candaleria, et al.*, 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023; and cited cases.

Proceeding upon a misinterpretation, misconception and mis-application of the legal principle announced in *Parker* v. *Richard, supra,* the Secretary, by his order of May 6, 1920, approved the Jackson leases and the contract with Johnson, the attorney for whose services the leases were executed. The approval of such leases was all that the applicants requested. Their application did not invoke further jurisdiction, if the Secretary possessed it.

However, notwithstanding the Secretary, like all others, was bound by the judgment and final decree of the trial court rendered June 17, 1919, which fixed Martha Jackson's rights and equities in keeping with valid prior contracts and conveyances—and notwithstanding he had no jurisdiction whatever over the estate of Thlocco—and after disclaiming jurisdiction to pass upon the validity of the conveyance by Parmenter July 9, 1917, to petitioner and his associates of Martha Jackson's unestablished and unadjudicated claim to the land—in an apparent attempt to create, extend and enlarge claimed jurisdiction, the Secretary resolved himself into a court or judicial body and made findings, "* * * as a matter of fact * * *," contrary to the facts adjudicated and decree rendered by the United States District Court for the Eastern District of Oklahoma—which court had exclusive jurisdiction to ascertain and determine the owners of the Thlocco allotment and estate and to adjust their rights and equities. *United States* v. *Gypsy, supra.*

Pursuing such erroneous assumption of authority, the Secretary, after entering his "judgment," by order attempted to enforce the specific performance by the Black Pan-

ther Co. of the royalty provisions of the Jackson leases made in 1913—*and under which no oil or gas had been produced*—by requiring that company to pay as royalty the proceeds of oil produced under the Receiver's lease. The Secretary had specifically prevented those leases being effectuated by the Black Panther Company by procuring the appointment of a Receiver and the development and operation of the property under such Receiver's lease. Such order would have been void had the Secretary possessed jurisdiction in the premises. Having no jurisdiction whatever, his order and efforts to enforce it were only a nuisance, and by the arbitrary exercise of the power of his office in preventing distribution to force compliance with such order placed the Black Panther Company, petitioner and his associates, under duress.

The Secretary's order was not directed against petitioner and his associates except to the extent necessary to prevent distribution by enlarging the nuisance, impediment and obstacle created by McKinney.

Petitioner at no time claimed any interest in the Jackson leases. He purchased Martha Jackson's unestablished and unadjudicated claim, subject to the lease her guardian had previously executed, and which had been assigned to the Black Panther Company. Petitioner never questioned nor attacked that lease. (Rec. 197-199) By valid contracts, and conveyances of Martha Jackson's unestablished and unadjudicated claim, petitioner acquired title to whatever royalty might become due under the Martha Jackson lease should it be effectuated by subsequent ratification. There was no reservation in Martha Jackson's contract and conveyance of July 9, 1917, of any royalty due under her particular lease. (Rec. 196-197) No oil had therefore been produced under that lease. An attempt to reserve royalty under that lease would have been futile.

The Secretary's order, purporting to identify the royal-

ty due under the Martha Jackson lease as one-half the funds accumulated by the Receiver under the Receiver's lease up to July 9, 1917 (the date of Martha Jackson's sale of her unestablished claim), and directing that such one-half of the royalty funds be paid to the Superintendent for the Five Civilized Tribes for Martha Jackson, was an arbitrary usurpation and exercise of power, without the scope of his authority. Such order could only be enforced by the abuse of the power of his office—by delaying and preventing judicial process—by preventing distribution—and by the exercise of duress—which was the method adopted.

By the contract of February 26, 1918 (Rec. 197-199), petitioner was fully protected against the Secretary's order, or any consequences resulting therefrom, except the delay in distribution of the funds while the Secretary attempted to enforce his order. The order was a nuisance, obstacle and impediment unanticipated at the time the contract of February 26, 1918, was executed. The delay in distribution of the funds could not have been obviated by that contract —as a consequence of which petitioner, along with the Black Panther Company, was placed under the Secretary's duress.

Apparently, although no reference thereto was made in his "judgment" and order, the Secretary sought support of his assertion of jurisdiction from the case of *United States* v. *Hinkle*, 261 Fed. 518, wherein the Circuit Court for the Eighth Circuit, after exercising unusual care to confine its decision to the record in that case *as presented*, held that under Sections 19 and 20 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and Section 2 of the Act of May 27, 1908, c. 199, 35 Stat. 312, and the regulations of the Secretary of the Interior promulgated July 7, 1906, June 11, 1907, and April 20, 1908, "the exclusive custody and control of the mineral rents and profits derived from *restricted* lands of full-blood tribal Indian citizens * * * is vested in the Secretary of the Interior, subject only to such rules and regula-

tions as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land it self, * * *."

There another misconception and misapplication of a legal principle was made by the Secretary. The question, *as presented,* in the *Hinkle* case arose out of an attempted conveyance by a full-blood heir of mineral rents and profits produced from land not leased prior to July 27, 1908, by the judicially determined heir, with the approval and under the supervision of the Secretary, or thereafter with approval of the proper County Court.

There the record, *as presented,* demonstrated oil and gas had been *unlawfully* produced. In that case the record, *as presented,* disclosed no color of title whatever in the lessees nor in Mullen, their lessor. There the record, *as presented,* disclosed the defendant oil companies and the lessor, by invalid conveyance of the accumulated royalties, were trespassers. The record, *as presented,* in that case disclosed no title in the defendants and full title in the full-blood Indian heir. (When remanded to the District Court for further proceedings, the case was dismissed by the Government because it there developed that the defendants had good title through a deed previously executed by the full-blood heir to Mullen, approved by the proper County Court, which, through inadvertence, had not been pleaded or proven in the trial in the lower court.)

Had the heir leased the land for oil and gas prior to July 27, 1908, the effective date of the Act of May 27, 1908, *supra,* such lease, to be valid, would have required the approval of the Secretary. After July 27, 1908, an oil and gas lease by the heir required only the approval of the County Court having jurisdiction of the estate of the deceased allottee.

—*United States* v. *Gypsy Oil Co.,* 10 F. (2d) 487; and other cases cited, *supra.*

The land not having been leased by the heir, either with the approval of the Secretary or the County Court, the deed executed by the heir in 1913, and before the land was developed for oil, which had been approved by the proper County Court and which, through inadvertence, had not been pleaded or proven, conveyed the entire fee simple title to the land and all mineral rights. Consequently, no application could be made of the court's decision in the *Hinkle* case by the Secretary to the *Thlocco* case.

In the *Thlocco* case no such situation existed. The impounded funds derived exclusively from the sale of oil produced under a Receiver's lease covering land over which the Secretary had no jurisdiction whatever *(United States* v. *Gypsy* and other cited cases, *supra)* executed at the instance of the Secretary, and enforced and administered by the court having exclusive jurisdiction of the Thlocco estate, whose jurisdiction the Secretary had invoked and admitted in causing the suit to be filed—and by whose orders, judgments and decrees the Secretary was fully bound.

—*United States* v. *Candaleria,* 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023, and cases cited, *supra.*

Petitioner and his associates did not apply for the Secretary's approval of their purchase contract. Neither Martha Jackson in her own right nor her legal representative, sought the Secretary's approval of either the oil and gas lease or her sale contract and conveyance of her unestablished and unadjudicated claim.

The application for the approval of the leases could not have conferred upon the Secretary, had he had jurisdiction to approve those leases, the power and authority to legally inquire into and promulgate his "judgment" and order in respect of the funds. Those matters had all been adjudicated by a court of exclusive jurisdiction previously invoked by the Secretary when he caused the suit to be filed in 1913 to

cancel the patent to Thlocco's allotment. In attempting to require the specific performance of the leases after approving them, and without any application or petition filed by Martha Jackson or her proper representative, the Secretary ran afoul of, and proceeded contrary to, the rule announced in *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385, in which the court stated:

> "But while the Secretary is authorized to prevent improvident alienation or leasing by restricted Creek allottees, he is not authorized to alien or lease in their stead and right. * * * If an allottee chooses to alien or lease, the Secretary, if not satisfied that the transaction will be of benefit to the Indian, can prevent it by not approving it. But, if the allottee chooses not to alien or lease, the Secretary cannot do so for him, even though it appears that the Indian would be benefited."

With no jurisdiction in the premises, and with no appropriate petition or application invoking his action, the Secretary, in attempting to require the specific performance of the Jackson leases, not only attempted to override and overrule the final decree of a court of competent and exclusive jurisdiction, but attempted to substitute himself in Martha Jackson's place and stead.

Effect of the Secretary's intercession.

No supersedeas bond was given by McKinney in his appeal from the order denying his petition for leave to intervene, nor by Saber from the order denying his intervention. The decree remained final and undisturbed, with the equities adjusted by the supplemental decree. Distribution of the impounded income was prevented by the Secretary of the Interior pending the settlement of the controversy between himself and Parmenter as to which should receive not only the money ordered by the Secretary on May 6, 1920, to be paid by the Black Panther Company to Martha Jackson, but also the amount due her under her valid prior sale con-

tract, over which he had no jurisdiction *(United States* v. *Gypsy, supra),* and the final decree, which the Secretary sought to override notwithstanding he was bound by such decree.

—*United States* v. *Candaleria,* 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023, and cited cases, *supra.*

Clearly petitioner and his associates in 1920 owned, free from contingencies or adverse claims, one-half the funds accumulated and held in trust by the Receiver, and by their contracts and the court's final decree were required to pay out of such funds $111,670.74 as of March 31, 1918, plus an additional amount that would equal one-fourth of one-half the additional funds accumulated by the Receiver between March 31, 1918, and June 17, 1919, LESS one-eighth of the entire receivership administration expense, which, by her sale contract and the final decree, was charged to Martha Jackson—the net amount being payable to Parmenter as her legal guardian and not to the Secretary or his subordinates. (Rec. 295, 296)

It is equally clear that the *Secretary's void order of May 6, 1920,* directed against the Black Panther Company, purporting to require the payment by that company of royalty to Martha Jackson, *created no contingency on or adverse claim to petitioner's impounded funds. Therefore, the "matter" to be adjusted, as held by the Circuit Court* (Rec. 650), *was not defective title or cost of acquisition of property but was the cost of removing a nuisance and impediment to distribution of impounded funds, title to which had been finally adjudicated and possession awarded by final decree, unappealed from, of a court of exclusive jurisdiction.*

The right to collect and retain any royalty payments under the Martha Jackson lease passed and inured to petitioner and his associates under Martha's sale contract and deed of July 9, 1917. The Secretary, in his void order of

May 6, 1920, expressly conceded he had no jurisdiction to approve those instruments. *With no jurisdiction whatever to promulgate or enforce his order, the Secretary's conduct constituted only a nuisance and impediment to distribution. When the Black Panther Company refused to comply with the Secretary's order in respect of payment to Martha Jackson and petitioner and his associates made such payment to prevent further delay in distribution, such payment contained none of the elements of capital investment or "outlay" but was an expense deductible in determining net taxable income.*

Bliss v. *Commissioner*, (C. C. A. 5) 57 F. (2d) 984;
Commissioner v. *Wurts-Dundas*, (C. C. A. 2) 54 F. (2d) 515;
Lucas v. *Wofford*, (C. C. A. 5) 49 F. (2d) 1027;
Atwater Kent Mfg. Co. v. *Commissioner*, (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner*, (C. C. A. 3) 44 F. (2d) 147;
Illinois Central Co. v. *Commissioner*, (C. C. A. 7) 90 F. (2d) 461;
Kornhauser v. *United States*, 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505.

The *Bliss* case is too long to be stated or discussed here, but an examination of it will reveal a clearly defined distinction between expense sustained in abating a nuisance and removing an obstacle and impediment to the use and enjoyment of income, and money paid out in the acquisition of property or the perfection and quieting of title thereto. There Bliss' (the taxpayer's) expense incurred in obtaining the free and unhampered use and enjoyment of his income was held to be deductible. The facts in respect of ownership, quieted and perfected title, and all other elements relating to income from previously acquired property are much stronger in the instant case than in *Bliss* v. *Commissioner, supra.* There an adverse claim to income was as-

serted. Here the Secretary's invalid and unauthorized demands were made against the Black Panther Company and not against petitioner. No claim against petitioner's portion of the impounded income can possibly be found in the Secretary's order.

In *Commissioner* v. *Wurts-Dundas, supra,* expense incurred by the guardian of Wurts-Dundas in establishing the minor's *right* to income from property was held to be deductible as a business expense. Here petitioner's right to the income had been previously adjudicated. No legal controversy or adverse claims affected petitioner's impounded income. The Secretary's demands against the Black Panther Company for payment, and against Parmenter for the right to administer the money demanded, constituted no adverse claim or contingency on petitioner's impounded income. Nevertheless it was clearly necessary for petitioner to assign, transfer and relinquish more than $75,000.00 of his impounded income in an effort to effectuate and expedite distribution to him of the residue thereof. Such payment, under the rule announced in the *Wurts-Dundas* case, was clearly deductible as expense when paid. The fact that such payment turned out to be fruitless strengthens petitioner's case, because it destroys any possibility of such payment being capital investment or "capital outlay."

In *Lucas* v. *Wofford, supra,* the taxpayer sustained expense in preventing the passage of legislation that would have been inimical to, or destructive of, his business, and such expense was held to be deductible as a necessary and ordinary business expense. Here petitioner was required to assign, transfer and relinquish more than $75,000.00 of his earned income in an effort to secure distribution of earned income for use in the conduct of his business. The issues are analogous, but the facts in the instant case are much stronger.

Atwater Kent Mfg. Co. v. *Commissioner,* (C. C. A. 3) 43 F. (2d) 331, and *Frank & Seder Co.* v. *Commissioner,* (C. C. A. 3) 44 F. (2d) 147. The first case states the rule on deductible expense announced and followed in the second case. (The facts and issues in both cases are peculiarly similar to the facts and issues in the instant case, and clearly distinguish the controlling principle in the instant case from the principle announced and followed in the cases cited in the Circuit Court's opinion.) For brevity we will discuss only the latter case since it cites the former with approval.

In *Frank & Seder Co.* v. *Commissioner, supra,* the taxpayer contracted to restore, or to pay the cost of restoring, two walls of a leased building at the expiration of its lease. The walls were removed so that the taxpayer could more conveniently, desirably and profitably conduct its business. The contract provided that if the taxpayer paid the cost of restoration, such payment should be made during the first year of the lease. The taxpayer made such election and paid in the first year $25,000.00, the agreed cost of restoration upon termination of the lease. The Commissioner denied the deduction. The Board defined the $25,000.00 estimated cost of restoring the property as "rent," but the Third Circuit Court of Appeals held, "This $25,000.00 was not 'rent,' but a necessary expense incurred in the taxable year in carrying on the business, and so was an allowable deduction for the year in which it was actually made."

Applying the principle announced to the instant case, the $75,000.00 here claimed as a deduction was not capital investment or capital "outlay," but was a necessary expense incurred in the taxable year in carrying on petitioner's business and to effectuate distribution to petitioner of his impounded income in order that he might continue to carry on his business, in the same manner that Frank & Seder paid the cost of restoration of the walls in order to be permitted to remove them and thus carry on its business and realize

and enjoy the income therefrom. The rule announced in *Frank & Seder Co.* v. *Commissioner* was cited with approval and applied in *Illinois Central Co.* v. *Commissioner,* (C. C. A. 7) 90 F. (2d) 461.

However, the second issue in *Frank & Seder Co.* v. *Commissioner, supra,* is so clearly in point as to be identical with the instant case, and the facts of which are so remarkably similar to the instant case that it is unquestionably decisive here.

Frank & Seder, Inc., operated a department store in Pittsburgh, Pa., which was totally destroyed by fire in 1917. A contract was immediately made for the erection of a new building. One Stuart received a fee of $40,000.00 as construction engineer to erect the building, which was to be completed by February 1, 1918, with a provision for a bonus of $10,000.00 if the building was completed before December 1, 1917.

In order to complete the building within the required time, it was necessary to pay a higher price for steel, and to work overtime at increased wages. The expense arising out of the increased wages alone amounted to $26,000.00. The excess cost of the steel was $44,024.00, and incurred solely to expedite the completion of the building in the shortest possible time so as to preserve the trade and good-will of the company.

The building would have been finished at the stipulated time had it not been delayed by general strikes which affected this and other buildings. In accordance with the provision in the contract, the time for completing the building was extended, on account of strikes, to May 1, 1918. Had completion of the building not been expedited by these additional payments, it would not have been finished, on account of the strikes, until January 1, 1919.

The question was whether or not the additional expense, totaling $84,372.75, having been spent in the fiscal year ended January 31, 1919, for the sole purpose of completing the building and resuming business on May 1, 1918, instead of January 1, 1919, was an expense deductible from income for that year. Petitioner contended that it was deductible expense. The Commissioner contended that it, like all ordinary capital expenditure, must be spread over the life of the lease and building. The Board sustained, but the court reversed, the Commissioner.

The court's reasoning is peculiarly applicable to the instant case. It said:

> "If this expense of expediting the completion of the building may be allowed as a deduction, it must be because it was necessary expense paid or incurred during the taxable year in carrying on the business or for the exhaustion, wear, and tear of the property used in the business. Usually the costs of material and labor are reflected in the building throughout its life. So far as the building does not remain permanent year by year, the owner is allowed a deduction and this in the years in which it occurs.
>
> "The expense paid for expediting the completion of the building was necessary in order to carry on the business during the fiscal year from May 1, 1918, to January 31, 1919. Without this additional expense there would have been no business conducted by the taxpayer during that time unless the company had rented a building, and if it had done so, the rent could have been deducted as a necessary expense incurred in carrying on the business. But instead of renting a building, the taxpayer expedited the completion of its own. Whether it was a better business policy to rent a building from May 1, 1918, to January 31, 1919, than to expedite the completion of its own, may be a debatable question. *But however that may be, the expense was incurred, and to carry on the business as planned it was necessary, and the evidence does not establish it to have been foolish or*

inexpedient. Consequently this was a necessary expense incurred during the taxable year in carrying on the business for which the statute authorizes a deduction. Therefore the deduction should have been allowed.

"The completed building on May 1, 1918, was worth what the expedition of the completion cost over what it would have cost to complete it by January 31, 1919. The exhaustion because of the wear and tear in carrying on the business between May 1, 1918, and January 31, 1919, was just this difference and for this a deduction should be allowed. *Atwater-Kent Manufacturing Company* v. *Commissioner of Internal Revenue,* (C. C. A.) 43 F. (2d) 331.

"The order of redetermination of the United States Board of Tax Appeals is reversed, the additional tax determined by the Commissioner set aside, and the income tax return of the petitioner approved."

The amount paid by petitioner in the instant case to expedite distribution to him of his impounded income occupied the same status as the amount paid to expedite the completion of the building in *Frank & Seder Co.* v. *Commissioner, supra,* and was paid for the same reasons and purposes. There the taxpayer incurred extra expense in order to expedite the construction of the building and more quickly resume and carry on its trade and business. Its good-will and business had been previously established. It sought to retain its good-will and resume as quickly as possible the conduct of its business in its own building. There delay in resumption of business was caused by strikes which increased the reasonable cost of the building. Here the delay in distribution was caused by the Secretary, which caused extra expense to petitioner in conducting his business. Here petitioner's ownership of his impounded income had been previously acquired and title thereto had been quieted and perfected. There the taxpayer, engaged in acquiring a capital asset, sustained expense in the conduct of its business.

Here the capital asset had been acquired and petitioner sustained deductible expense in attempting to secure distribution of impounded earned income in order to carry on his trade and business.

As stated above, the facts in *Frank & Seder Co.* v. *Commissioner, supra,* and in the instant case are so similar as to make the issues identical. The decision of the Third Circuit Court of Appeals in the case of *Frank & Seder* v. *Commissioner* should certainly be decisive of this case.

In *Kornhauser* v. *United States, supra,* the Supreme Court held:

> "Fees paid to attorney for defending action for accounting instituted by former partner are deductible from gross income as ordinary and necessary expenses paid or incurred during taxable year in carrying on business under Revenue Act 1918, Sec. 214, (a), subd. 1 (Comp. St., Sec. 6336⅛g), since, where suit against taxpayer is directly connected with business, expense incurred is 'business expense'."

The closing paragraphs of the opinion read:

> "In the *Appeal of F. Meyer & Brothers Co.,* 4 B. T. A. 481, the Board of Tax Appeals held that a legal expenditure made in defending a suit for an accounting and damages resulting from an alleged patent infringement was deductbile as a business expense.
>
> "The basis of these holdings seems to be that where a suit or action against a taxpayer is directly connected with, or, as otherwise stated *(Appeal of Backer,* 1 B. T. A. 214, 216), proximately resulted from, his business, the expense incurred is a business expense within the meaning of Section 214 (a), subd. 1, of the act. These rulings seem to us to be sound and the principle upon which they rest covers the present case. If the expense had been incurred in an action to recover a fee from a client who refused to pay it, the character of the expenditure as a business expense would not be doubted. In the application of the act we are unable to perceive

any real distinction between an expenditure for attorney's fees made to secure payment of the earnings of the business and a like expenditure to retain such earnings after their receipt. One is as directly connected with the business as the other."

Applying the principle announced, there is no distinction in the instant case from the *Kornhauser* case. Had petitioner employed attorneys to resist the Secretary's "judgment" and order and, by contract in 1920, assigned a portion of his impounded income as their fee for prosecuting the necessary legal proceedings to bring about or force distribution of petitioner's impounded income, the effect and results from the tax standpoint would have been the same as avoiding a lawsuit. In the instant case petitioner assigned, relinquished and transferred a portion of his impounded income to avoid the expense of a lawsuit and the loss of the use of his income, pending such litigation. Distribution of impounded income, title to which had been quieted and perfected and possession awarded by final decree by a court of competent and exclusive jurisdiction, and from which no appeal had been taken, was the object of making the payment here claimed as a deductible expense sustained in the usual and ordinary course of petitioner's business.

Loss Deduction.

After petitioner made payment of $75,989.20 to Martha Jackson in 1920, and the Secretary continued to prevent distribution until Parmenter, Martha's legal guardian, complied with his demands in respect of distribution,—and after partial distribution—(to the Superintendent of the Five Civilized Tribes in September, 1922, (Rec. 200) of $318,261.04, the sum of the amount due Martha Jackson under her sale contract and the additional amount paid in 1920 by petitioner and associates to expedite distribution)—the Secretary still continued to prevent distribution until the Black

Panther Company complied, in part, with the Secretary's demands in respect of payment to Saber Jackson (Rec. 321-323)—the payment made by petitioner became and resulted in a loss, since no benefits therefrom were derived by petitioner, and such payment was deductible as a loss in determining net taxable income.

—*F. W. Darling* v. *Commissioner,* (C. C. A. 4) 49 F. (2d) 111;
Dayton Co. v. *Commissioner,* (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas,* (C. C. A. 9) 44 F. (2d) 528;
Commissioner v. *Brown,* (C. C. A. 1) 54 F. (2d) 569-570;
United States v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Rhodes v. *Commissioner,* (C. C. A. 1) 100 F. (2d) 966.

In *Darling* v. *Commissioner, supra,* the petitioner discharged the obligations of a company with no hope of recovery. Such payments, or most of them, were definitely losses and known to be when made. Here the payment was a loss because it was an exaction required in an attempt to expedite distribution of impounded income to which petitioner had quieted and perfected title, of which he had constructive possession, but distribution of which was prevented because of the arbitrary acts of the Secretary.

Petitioner was forced to transfer, relinquish and assign a part of his impounded income in an effort to avoid and prevent further and extended delay in distribution thereof and the loss of the use of such income. Petitioner was entitled to distribution, and although payment was voluntarily made to expedite distribution, the same would have been a loss had distribution been promptly made as anticipated, for the reason that petitioner was entitled to his income without being subjected to such exaction. With distribution being further delayed, certainly no benefits were derived by

petitioner, and most assuredly exactions of a portion of impounded income, title to which has been quieted and perfected by final decree of a court of competent and exclusive jurisdiction, to permit or expedite distribution of the residue can only be a loss.

In *Dayton Co.* v. *Commissioner, supra,* buildings were transferred for removal thereof in order to obtain the use of the land free from such buildings which constituted obstructions to the anticipated future use of the real property. There the cost of the razed improvements were held to be a loss and deductible as such. Here petitioner parted with title to part of his impounded income in order to effectuate distribution and obtain the use of the residue thereof. Petitioner owned the impounded income as clearly and as definitely in the instant case as the Dayton Company owned the razed buildings in that case, and as definitely as Darling, in *Darling* v. *Commissioner, supra,* owned the money paid to discharge the corporation's losses in an effort to more satisfactorily conduct his own business.

In *Seuffert Bros.* v. *Lucas, supra,* the taxpayer was held to have sustained a deductible loss through the payment of a substantial sum of money to prevent a highway being constructed through its property, on the ground that such highway would not have enhanced the value of the property or constituted an improvement, or otherwise benefited the taxpayer, but on the other hand, had such highway been constructed through the property, a substantial loss, in the form of damage to the property, would have been sustained. The cost of preventing the damage to the property was held to have been a deductible loss. In the instant case the cost of attempting to expedite distribution of impounded income and preventing the damage and loss that would be sustained through the loss of the use of such income by petitioner in his business is equally and as clearly deductible as a loss.

In *Commissioner* v. *Brown, supra,* the case of *United States* v. *S. S. White Dental Mfg. Co., supra,* is cited with approval and extensively quoted.

For convenience of discussion, the language of the First Circuit Court in *Commissioner* v. *Brown, supra,* is herewith quoted:

> "In the case of *United States* v. *Brown,* the Commissioner appeals from the decisions of the Board overruling the Commissioner in refusing to allow the partners, Jacob F. Brown, to deduct $72,961.83 as a loss in 1918, being the cost of certain Japanese government bonds purchased by him in 1916 and left in the custody of a Berlin bank, and which the German government, in 1918, seized as alien enemy property. While the Armistice was signed November 11, 1918, and the bonds were restored to the owner in 1920, the bonds were lost in 1918, as far as the owner was concerned, and there was no certainty at the end of that year that they would ever be restored to him. Peace terms between Germany and the United States were not agreed upon until much later.
>
> "The case of *United States* v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 S. Ct. 598, 600, 71 L. ed. 1120, seems to support the contentions of the petitioner, in which case the court said:
>
> > 'The case turns upon the question whether the loss, concededly sustained by the respondent through the seizure of the assets of the German company in 1918, was so evidenced by a closed transaction within the meaning of the quoted statute and treasury regulations as to authorize its deduction from gross income of that year * * *.
> >
> > 'The sequestration of enemy property was within the rights of the German government as a belligerent power and when effected, left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace. See *Littlejohn & Co.* v. *United States,* 270 U. S. 215, 46 S. Ct. 244, 70 L. ed. 553;

White v. *Mechanics' Securities Corp.*, 269 U. S. 283, 300, 301, 46 S. Ct. 116, 70 L. ed. 275; *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42, 45 S. Ct. 213, 69 L. ed. 504; *Stoehr* v. *Wallace*, 255 U. S. 239, 242, 244, 41 S. Ct. 293, 65 L. ed. 604; *Central (Union) Trust Co.* v. *Garvan*, 254 U. S. 554, 41 S. Ct. 214, 65 L. ed. 403; *Brown* v. *United States*, 8 Cranch, 110, 122, 3 L. ed. 504. What would ultimately come back to it, as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor. In any case the amount realized would be dependent upon the hazards of the war then in progress * * *.

'The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment. It would require a high degree of optimism to discern in the seizure of enemy property by the German government in 1918 more than a remote hope of ultimate salvage from the wreck of the war. The taxing act does not require the taxpayer to be an incorrigible optimist.

'We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery.'

"The fact that the Japanese government was the petitioner's debtor when the only evidence of its indebtedness had been seized under the rights of belligerents during a state of war, and had become the property of the German government, and the only chance of its being restored to the taxpayer was either 'a matter of grace to the vanquished or exaction by the victor,' can hardly serve to differentiate the case of *United*

States v. *S. S. White Dental Mfg. Co., supra,* from this. Whatever doubts there may be on this and the other issues first considered, should be resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 38 S. C. 53, 62 L. ed. 211."

The analogy is perfect. Here the Secretary in effect, seized petitioner's impounded income by preventing distribution thereof to petitioner in his efforts to enforce his void order directed against the Black Panther Company. The Black Panther Company, by contract of February 26, 1918 (Rec. 197-199), agreed and bound itself to perfect petitioner's title to the Thlocco estate and one-half the income therefrom impounded by the Receiver, and further, agreed that "Parties of the first part (petitioner and his associates) are to receive one-half (½) of all the monies held by said receiver when the same shall finally be distributed under the order of the court, and are further to receive thereafter one-eighth (⅛) of all the oil and gas produced from said premises the same being the royalty interest due under the said Martha Jackson lease * * * free from any claim from the party of the second part upon said one-eighth (⅛) royalty." (Rec. 197-199)

The Black Panther Company performed that contract. Petitioner and his associates acknowledged and accepted such performance and on October 7, 1918, paid to the Black Panther Company the consideration for such performance, such consideration being a deed to that company of the Saber Jackson interest or claim to the Thlocco estate. (Rec. 199)

The United States District Court for the Eastern District of Oklahoma, with exclusive jurisdiction in the premises, by final decree rendered June 17, 1919, quieted and perfected petitioner's title as completed by the Black Panther Company's performance of its contract. (Jt. Ex. B-2, Rec. 297)

Petitioner was as much and as fully the owner of his portion of the impounded funds as was Brown the owner of the Japanese bonds sequestered by the German government. Here the Secretary, in substance and effect, sequestered petitioner's impounded income by preventing distribution thereof. Brown was without right to demand delivery of, or compensation for, his bonds until the declaration of peace. Here distribution of petitioner's impounded income was prevented by the Secretary, pending, *first*, settlement of his demands in respect of payment to Martha Jackson asserted against the Black Panther Company, and *second*, compliance with his demands by the legal guardian of Martha Jackson that the decree be modified to provide that Martha's money be distributed to, and custody thereof retained by, the Secretary or his subordinate.

With the Secretary preventing distribution and, in effect, sequestering petitioner's impounded income until his demands against the Black Panther Company and Parmenter, the legal guardian, had been fulfilled, petitioner occupied an identical position to that of Brown with his bonds seized by the German government and unable to reclaim or recover them pending a declaration of peace.

Petitioner was not involved in the controversy between the Secretary and the Black Panther Company, or that between the Secretary and Parmenter. The Black Panther Company had fully performed its contract with petitioner. That performance had been accepted, approved and payment therefor had been made by petitioner. The court, in effect, had decreed that the Black Panther Company had performed its contract. Time was not of the essence of such contract. Petitioner could not demand of, nor require that, the Black Panther Company comply with the Secretary's demands, nor that Parmenter yield to the Secretary's demands.

In *Rhodes* v. *Commissioner, supra,* the entire cost of, or investment in, property damaged by hurricanes, was held to be a loss deductible in the year when the hurricanes occurred because the taxpayer was unable to sell the property and determined it had no further value, notwithstanding in a later year the taxpayer salvaged a nominal amount out of one of the properties, which salvaged amount was considered income for the later year in which it was received.

Section 214 of the Revenue Act of 1918, and Section 214 of the Revenue Act of 1921, provide that casualty within the law authorizing deduction for loss means event due to sudden, unexpected or unusual cause. In *Shearer* v. *Anderson,* 16 F. (2d) 995, and in *Matheson* v. *Commissioner,* 54 F. (2d) 537, the courts held that "casualty is effect and not cause."

A casualty or a business calamity overtook the taxpayer in *Rhodes* v. *Commissioner.* While hurricanes in Florida were not unexpected, and damage resulting therefrom was not unusual, the entire cost of taxpayer's property damaged by hurricanes was held to be deductible as a loss in *Rhodes* v. *Commissioner, supra.*

The instant case is stronger. Here a casualty to petitioner's business resulted from the Secretary's void order and arbitrary conduct. The conduct of the Secretary was more unexpected than Florida hurricanes, and in violation of the reasonable legal presumption that the Secretary would act only within the scope of his authority. Petitioner was unable to prevent the Secretary promulgating and attempting to enforce his void order against the Black Panther Company in respect of payment, and his subsequent demands upon the legal guardian in respect of distribution and custody of Martha Jackson's money. Refusal on the part of the company to pay, and delay on the part of the guardian in complying with the Secretary's demands, delayed distribution to petitioner of his impounded income. With the

Black Panther refusing to comply with the Secretary's demands in respect of payment to Martha Jackson, had Parmenter, after petitioner made the payment demanded by the Secretary, continued to refuse to yield to the Secretary's demands and permit Martha Jackson's money to be administered by the Secretary or his subordinate, petitioner's income would have been impounded indefinitely, pending long drawn-out litigation, groundless in law and between other parties, but which nevertheless would have been prosecuted by the Secretary through the Supreme Court of the United States because of the amount of money involved.

It goes without saying, that during such protracted litigation the Secretary would have continued to prevent distribution to petitioner of all his accrued and accruing income so that all value to petitioner of his interest in the Thlocco estate and his income therefrom would have been lost or destroyed, pending such controversy. The fact that petitioner might have ultimately obtained distribution placed him in no different legal situation than the taxpayer in *Rhodes* v. *Commissioner, supra,* and in *Commissioner* v. *Brown, supra.*

The opinion and decision here sought to be reviewed is in direct conflict with each and all the above cited cases.

Clearly the Secretary's order created no adverse claim upon petitioner's impounded funds, title to which had been finally adjudicated and possession awarded by final decree, unappealed from, of a court of exclusive jurisdiction. Payment made to expedite distribution of such funds contained none of the elements of capital investment or "outlay" and is deductible under the authorities cited and discussed.

POINT 2.

The Circuit Court did not review or consider the Board's Memorandum Opinion in support of its decision,

which Memorandum Opinion erroneously decides the following Propositions I and II,—but said Circuit Court rendered its opinion upon a question of fact and upon a question of law, without deciding it, expressly not considered and not decided by the Board.

Proposition I. **"Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,**

"Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income,* in the year the funds are transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties each claiming the right to act as trustee for transferee and receive the transferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties."

The Board held (Rec. 478):

"* * * Petitioner claims that the court's order pursuant to the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson) caused the loss of $75,989.20 to himself.

"It will be observed from the findings of fact, *supra,* that it was not until September, 1922, that the money was paid out of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson. Consequently if petitioner's tax

return was compiled on the cash basis for the year 1920, neither a loss nor an expenditure in that year can be claimed since no money was actually paid in that year."

Time of Payment.

In its memorandum opinion the board confused "distribution" with "payment" and confused the date "September, 1922," when the Receiver made partial distribution of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson, with *payment* to Martha Jackson. The Receiver *paid* only his receivership administration expenses. He *distributed* the residue of those funds to the beneficiaries of the estate (the owners of the funds).

Those funds belonged to the owners in the proportions and the amounts fixed by the final decree of June 17, 1919, and the supplemental decree of September 9, 1919—until execution of the December, 1920 contract "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478) directly in the amount of $202,637.84 and, by which petitioner and associates assumed her one-eighth of the entire administration expenses and charged her portion of those expenses to the residue of their impounded funds. After such December, 1920 contract was executed, Martha Jackson owned—and the Receiver held $202,637.84, plus one-eighth of any uncomputed receivership administration expenses more in trust for her, and held correspondingly less in trust for petitioner and associates.

In September, 1922, $318,261.04 in United States Liberty Bonds was *distributed* to the Superintendent for the use and benefit of Martha Jackson. The additional $10,261.04 represented interest accumulated on such Liberty Bonds, after the December, 1920 contract. The Receiver *distributed* the impounded funds contrary to the court's decrees

of June 17, 1919, and September 9, 1919, as a result of the December, 1920 Contract "which awarded additional moneys out of the impounded funds to Martha Jackson." (Rec. 478)

No appeals had been taken from the decrees, as hereinbefore demonstrated, the term of court at which such decrees were rendered had expired, the District Court was without jurisdiction, power or authority to change or modify its decree, the Circuit Court likewise was without jurisdiction, power or authority to change or modify the decrees except by agreement between the interested and prevailing parties, because the appeals from the orders denying leave to intervene did not put the decrees in issue nor confer upon the Circuit Court jurisdiction to modify or affirm the final decree. The Circuit Court could only direct the modification of the decree to conform to agreement between the interested and prevailing parties.

Therefore, Martha Jackson's right to the additional sum of money paid to her (plus one-eighth of the entire administration expenses of which Martha Jackson was relieved) over and above the amount provided by her valid prior sale contract and the final decree, *was purely contractual.*

The "court's order" directed *distribution* in 1922 to the Superintendent for the use and benefit of Martha Jackson. Payment was made by "* * * *the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson).*" (Rec. 478) The authority for such "court's order" was contractual and was "* * * *the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson)* * * *." The "court's order" did not cause the *payment* nor create the loss. The "court's order pursuant to the 1920 stipulation" (Rec. 478) merely directed *distribution. Payment* was made by the December, 1920 contract. Consequently that contract and payment created and resulted in the loss.

Parmenter, until the December, 1920 contract was made with McKinney, was estopped to assert the Secretary's "judgment" and order. *McKinney* v. *Black Panther Co., Supra.* (Ex. 20, Rec. 631,642) The Secretary was also legally estopped to enforce his order. *United States* v. *Gypsy; Mott* v. *United States, supra.* McKinney was asserting the Secretary's demands and attempting to enforce his "judgment" and order. Until McKinney was later prohibited in March, 1921, he was the only person with whom the contract should have been made to abate the nuisance and remove the obstacle to distribution created by the Secretary's "judgment" and order.

When the December, 1920 contract was executed petitioner, his associates, and the Black Panther Company had done all they could do to comply with the Secretary's order *in respect of payment.* They were ready, willing and able to pay with *unimpounded funds* (Rec. 286-287, 291), but that was not acceptable to the Secretary. He specifically demanded *payment out of impounded funds* and the modification of the decree to so provide. Consequently, petitioner and associates *paid* the money out of the identical funds and in exactly the manner demanded by the Secretary. In so doing they contracted with the only person asserting the Secretary's demands who claimed the right to act for Martha Jackson.

The matter of modifying the decree to provide for distribution to the Superintendent, as trustee for Martha Jackson, instead of to Parmenter, as the law provided, required Parmenter's consent, approved by the Seminole County Court. Of course, petitioner and his associates could not force Parmenter to consent, nor the Seminole County Court to approve his consent. Pending settlement of the controversy between Parmenter and the Secretary, Martha owned the additional money, her title to the additional money awarded by the December, 1920 contract was complete, and

quieted and perfected by the same decree which quieted and perfected title to the remainder of the impounded funds—and the Receiver held such payment in trust for her.

Therefore, payment in 1920 was complete—*the transaction was closed as between petitioner and associates and Martha Jackson*—nothing remained to be done in respect of *payment*. The continuing controversy between Parmenter and the Secretary involved *distribution—not payment*—of Martha Jackson's money to one or the other of the contestants demanding the right to administer such money for her, and both of whom contended that it had been unconditionally paid to her and was unconditionally owned by her.

The Board's confusion of "payment" with "distribution" by the Receiver in September, 1922, of $318,261.04, to the Superintendent for the use and benefit of Martha Jackson, and the Board's conclusion, in effect, that petitioner's 1920 return was on the cash receipts and disbursements basis, and that no money was "paid" to Martha Jackson until September, 1922, and consequently neither a loss nor an expenditure in 1920 could be claimed by petitioner, makes necessary brief consideration of the 1920 contract and its effect upon the instant case.

Effect of December, 1920 contract.

The record discloses that Parmenter, on February 5, 1920, commenced his action in the Oklahoma Supreme Court for a writ of prohibition against McKinney, and the County Court of Okfuskee County which had made the pretended appointment of McKinney as Martha Jackson's guardian; that Parmenter was estopped to assert the *Secretary's demands*. (Ex. 20, Rec. 631, 640) After the December, 1920 contract "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478) had been executed, Parmenter was in position to assert his right to administer the $202,637.84 transferred to Martha Jackson —and did so.

Parmenter sought not only to prohibit McKinney from interfering with the administration of Martha Jackson's estate, but also to enforce his right as her legal guardian to administer the additional funds transferred to Martha Jackson by the December, 1920 contract—and not until October, 1921 (and after McKinney's petition for rehearing had been denied by the Oklahoma Supreme Court September 13, 1921, Rec. 631, 640), did he consent, with the Seminole County Court's approval, to Martha Jackson's money, due her under her sale contract and the final decree, but also the additional funds transferred to her by the December, 1920 contract, being *distributed* by the Receiver to the Superintendent for Martha's use and benefit. (Rec. 310-313)

Had the Secretary been content to permit Martha Jackson's money to be *distributed* to Parmenter as the law provided, there would have been no further delay in such *distribution*. With the Secretary demanding the decree be modified to provide for *distribution* to the Superintendent instead of to Parmenter, *distribution* was postponed by the Secretary's demands but that act did not change nor affect Martha Jackson's ownership of the additional money paid by the December, 1920 contract. Such delay in *distribution* merely continued the Receiver as trustee for Martha Jackson's money and delayed transfer of her money by one trustee to another.

The Secretary employed the same methods against Parmenter in his demands that Martha Jackson's money be *distributed* to his subordinate, the Superintendent, that he employed against the Black Panther Company, petitioner and associates in demanding *payment—viz,* duress—preventing *distribution* to Parmenter of Martha Jackson's money.

Of course, Parmenter and McKinney were claiming the right to act in a representative capacity only for Martha Jackson. The Secretary not only asserted such right, but

also sought to and did substitute himself for her. No one legally authorized to represent Martha Jackson made demand for the additional money prior to the December, 1920 contract. On the contrary, Martha Jackson's only legal representative, Parmenter, had repudiated the Secretary's demands and sought to enforce the decree.

It follows without argument that before Parmenter changed his position and asserted his right, as Martha Jackson's legal guardian, to have the additional money distributed to him, the contract "which awarded the additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), unconditionally assigned, relinquished and transferred such additional money to her. Thereafter all his efforts, as well as those of McKinney until he was finally estopped, by denial of his petition for rehearing by the Oklahoma Supreme Court, September 13, 1921, and the efforts of the Secretary were directed towards procuring *distribution* of Martha Jackson's money—with Parmenter asserting his right to have such money *distributed* to him and the Secretary demanding and finally forcing *distribution* of her money to the Superintendent. They—and not petitioner—after the December, 1920 contract was executed, claimed and exercised all control and dominion over such additional funds.

Effect of acceptance of contract:

Had McKinney's attempt to intervene and his pretended appeal created a contingency on petitioner's ownership of the impounded funds (which it did not) his acceptance of the 1920 contract removed such contingency on ownership and payment, and made the payment complete in 1920. After McKinney was prohibited in 1921 all questions he raised in his attempt to intervene and in his appeal became moot, and any contingency his appeal may have created (which was none) was extinguished and, by relation, as of

the date of his alleged appointment. Not being legally appointed he, of course, created no contingency on ownership and, therefore, created no contingency on payment.

Had McKinney been legally appointed guardian of Martha Jackson, and had he actually created a contingency on petitioner's ownership of the impounded funds, his acceptance of the 1920 contract disposed of any such contingency and settled and concluded any controversy over *payment* to Martha Jackson that may have resulted from the Secretary's "judgment" and order, and *payment* by the December, 1920 contract was complete.

—*Carter Oil Co.* v. *Fleming, supra;*
Harris v. *Davis, supra;* and
Derrisaw v. *Shaffer, supra.*

Not being such legal guardian, and having created no contingency on petitioner's ownership of the impounded funds, and with Parmenter asserting his right to administer the "additional moneys out of the impounded funds (awarded) to Martha Jackson," the payment by the December, 1920 contract was certainly complete.

—*Carter Oil Co.* v. *Fleming, supra;*
Harris v. *Davis, supra;* and
Derrisaw v. *Shaffer, supra.*

With the Secretary, McKinney and Parmenter all claiming the right to administer such additional money, the payment made by the December, 1920 contract was perfectly complete and free from contingencies.

With the Secretary's demands in respect of payment to Martha Jackson satisfied by the December, 1920 contract —with McKinney prohibited March 29, 1921, from further interfering with the administration of Martha Jackson's estate—with distribution of any of the funds being prevented by the Secretary until Parmenter agreed that Martha's money should be distributed to the Superintendent (which

eliminated any possible contingency on payment to her, and insured performance of the December, 1920 contract), and there remaining only the matter of Parmenter's complying with the Secretary's further demand that the decree be modified to direct distribution to the Superintendent instead of to Parmenter, the prolongation of the controversy between Parmenter and the Secretary did not in any manner affect the *payment* in December, 1920, to Martha Jackson.

That controversy only delayed and postponed the distribution by the Receiver as one trustee, to the Superintendent as another trustee, for Martha Jackson. During such continued controversy Martha Jackson's money was as securely and safely held in trust for her by the Receiver as it could have been held in trust by the Superintendent.

In its memorandum opinion the Board concluded no money was paid to Martha Jackson until September, 1922. (Rec. 478) *Under that theory,* if Parmenter had not yielded to the Secretary's demand in respect of modifying the decree to permit Martha Jackson's money to be distributed to, deposited with, and held in trust by, the Superintendent, and the controversy between Parmenter and the Secretary over the right to administer her funds had continued until the present time (notwithstanding the Receiver, in 1923, had distributed to all other owners their respective portions of such funds and continued until the present to hold Martha's money pending settlement or decision of the controversy between Parmenter and the Secretary)—*there would still be no payment to Martha Jackson.* In other words, the Board concluded that *payment* to Martha Jackson could only result from distribution by the Receiver, as one trustee, to either Parmenter or the Secretary, as another trustee. Such theory and conclusion, of course, are wholly untenable.

—*Dayton Co.* v. *Commissioners,* (C. C. A. 8) 90 F. (2d) 767, and cited cases.

With *payment* having been made by petitioner and accepted in 1920,—not only by McKinney, but also by Parmenter, her legal guardian, and by the Secretary, each of whom sought to have *distributed* to him as Martha's representative the funds transferred to her by the December, 1920 contract,—it is obvious and clear that *payment* was not only complete and accepted, but that all who claimed the authority to act in a representative capacity for Martha asserted *payment* had been made. It is also clear that when the Board's confusion of *payment* by petitioner with *distribution* by one trustee for Martha Jackson to another is eliminated, the erroneous conclusion of the Board (that no payment was made until 1922) is self-evident. It is equally clear that having found the 1920 stipulation "awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), the Board would have concluded such moneys awarded to Martha Jackson by the 1920 stipulation constituted a deductible expense had the Board not confused "payment" in 1920 by petitioner with "distribution" in 1922 by the Receiver, as one trustee for Martha Jackson, to the Superintendent, as another trustee.

When, on September 13, 1921 (Ex. 20, Rec. 640), McKinney's petition for rehearing was denied by the Oklahoma Supreme Court and he was finally estopped from further attempting to act as Martha's guardian (although he was still in position to act as guardian of Saber Jackson), an agreement executed by Parmenter and approved by the County Court of Seminole County, was necessary before the Secretary's demand—in respect of modifying the decree to provide that Martha Jackson's money should be distributed to the Superintendent instead of to Parmenter—could be effectuated.

Such agreement—the "Supplemental Contract" (Ex. C-3, Rec. 310)—necessarily had to provide not only for the

modification of the decree but also the construing contract of May 11, 1918. (Ex. A-1, Rec. 294) That contract and the sale contract of July 9, 1917, provided expressly for payment to Parmenter, as Martha Jackson's guardian, of the sale price of her unestablished and unadjudicated claim.

Parmenter was still the legally appointed, qualified and acting guardian of Martha Jackson. To modify the decree, as demanded by the Secretary, required the signatures of all the interested and prevailing parties. Such "Supplemental Contract" did not change or affect in one iota the prior payment by the December, 1920 contract. It merely effectuated the settlement of the controversy between Parmenter and the Secretary, and was a detail implementing such settlement.

The other provisions of the "Supplemental Contract" were precautions against Parmenter's demanding distribution or payment under the sale contract and the construing contract, and against the Secretary's making any new or additional demands against the Black Panther Company under the Jackson leases.

With the facts clear and the law settled that the Secretary had no jurisdiction, power or authority to legally pursue in any particular the policy he adopted of subjecting the Black Panther Company, petitioner and associates to duress in enforcing his demands for payment to Martha Jackson, and by his preventing distribution of any of the funds until his demands had been complied with, it is abundantly clear that the December, 1920 contract was the identifiable event, the closed transaction, which effectuated the Secretary's invalid order in respect of *payment*—

And with his subsequent conduct of preventing distribution until Parmenter yielded to his demands and consented, with the Seminole County Court's approval, to Martha's money being distributed to the Superintendent,—and con-

tinuing after Parmenter's consent, to prevent distribution of any of the funds until Martha's money had been actually distributed to the Superintendent, which insured not only the performance of the December, 1920 contract in respect of *payment*, but also Parmenter's performance in respect of *distribution*,—

It is also abundantly clear that all events, developments, stipulations, agreements or supplemental contracts were mere details to enable the Secretary to have Martha Jackson's money, due under her sale contract and the court's final decree, together with the additional funds he demanded, distributed to his subordinate instead of to Parmenter, as the law provided;—and that by relation, the date of the Secretary's order, May 6, 1920, is the date the *loss* was sustained. *Dayton Co.* v. *Commissioner, supra.*

Deductibility.

On the cash receipts and disbursements basis, the three prerequisites to deduction as a loss being *(1)* ownership of assets, *(2)* sustained in the taxable year, and *(3)* not compensated for by insurance or otherwise, have here been clearly established. Petitioner, in 1920, not only owned his portion of the income impounded by the Receiver, but also had constructive possession thereof, the decree of June 17, 1919, having specifically decreed the possession of such funds to petitioner. (Jt. Ex. B-2, Rec. 305)

With petitioner's ownership having been established, the *payment* having been made in 1920, and it being conceded by respondent that petitioner was not compensated by insurance or otherwise in the transaction, it is abundantly clear that the assignment, relinquishment and transfer of the money to Martha Jackson by the December, 1920 contract, was a payment in the usual and ordinary course of petitioner's business, although he was in fact under duress

—and that at the time of making such payment it was *both an expense and a loss.*

On the expense basis, petitioner paid out the money to avoid further delay in the distribution of his impounded income, to which he had quieted and perfected title, of which he had constructive possession, and for which the Receiver was the statutory taxpayer whose mandatory duty it was to report such income and pay the tax thereon, as a consequence of which, all requirements of the Revenue Acts and regulations, in respect of reporting, had been fulfilled and such payment is clearly deductible as expense.

—*Bliss* v. *Commissioner, supra;*
Atwater Kent Mfg. Co. v. *Commissioner, supra;*
Frank & Seder Co. v. *Commissioner, supra;*
Illinois Central Co. v. *Commissioner, supra.*

Had petitioner employed attorneys to resist the Secretary's "judgment" and order and by contract in 1920 assigned a portion of his impounded income as their fee, the effect and results from a tax standpoint would have been the same as avoiding a lawsuit, and such payment is deductible as expense.

—*Kornhauser* v. *United States, supra;*
Lucas v. *Wofford, supra;*
Commissioner v. *Wurts-Dundas, supra.*

At the time of making such payment by the December, 1920 contract, it was definitely a loss *(F. W. Darling* v. *Commissioner,* 49 F. (2d) 111; *Seuffert Bros.* v. *Lucas,* 44 F. (2d) 528-530 (C. C. A. 9)); because, without in any manner improving or perfecting his title, petitioner, while under the Secretary's duress, assigned, relinquished and transferred to Martha Jackson funds to which he had title, quieted and perfected by a court of competent and exclusive jurisdiction *(United States* v. *Gypsy, supra),* and by whose orders and decrees the Secretary was fully and completely bound.

—*United States* v. *Candaleria, et al., supra.*

Such loss was sustained by petitioner in an effort to avoid the expense of a lawsuit with the Secretary over the invalidity of his "judgment" and order and the further loss by petitioner of use of his income and, as such, is deductible.

—*Seuffert Bros.* v. *Lucas*, 44 F. (2d) 528-530 (C. C. A. 9).

When Deductible.

With the December, 1920 contract having been executed and petitioner and his associates having thereby assigned, relinquished and transferred the $202,637.84 to Martha Jackson, and having parted title with and relinquished all future control, custody or dominion over such funds, the transaction was complete and *deductible in 1920 (Dayton Co.* v. *Commission, supra; F. W. Darling* v. *Commissioner, supra)*, regardless of the length of time necessary to settle the controversy between Parmenter, McKinney and the Secretary, during which time the Receiver, as one trustee, continued to hold such money in trust for distribution to another trustee for Martha Jackson, and until distributed he held more money in trust for Martha Jackson and correspondingly less money in trust for petitioner and associates than provided by the final decree and Martha Jackson's sale contract.

Proposition II. **"Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in and awarding possession to others of such property and impounded income or funds—by appealing from an order of the trial**

court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

"Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trutee."

The foregoing discussion and argument of Point 1 and Proposition 1 are equally applicable to and settle Proposition II in petitioner's favor.

Proposition II is created by the Board's erroneous conclusion (Rec. 479) that

> "If it had been finally adjudged in 1922 that Martha Jackson's claim to the Thlocco grant was not valid, there is no question that Martha Jackson could have claimed nothing under the 1920 contract because there would have been no impounded funds from which Martha would have had a right to be paid. It is thus evident that throughout the years 1920 and 1921 and up until March 25, 1922, there was always a contingency on petitioner's assumed obligation. That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal."

The Board's confusion of the facts is as self-evident as its above quoted conclusion is erroneous. The appeal referred to as "the 1922 appeal" is McKinney's appeal from the court's order denying his petition for leave to intervene (Rec. 632-644). In the record such appeal was, for convenience, referred to as Martha Jackson's since McKinney claimed to be her guardian.

With Parmenter, Martha's legal guardian, the only person legally authorized to represent her, *asserting the finality of the decree of June 17, 1919,* and successfully prosecuting a suit to prohibit McKinney from interfering with distribution of her impounded funds and administration of her estate, McKinney was at all times an interloper who was properly denied leave to get into the case. Neither Martha Jackson, in her own name, she being an incompetent after attaining majority, nor Parmenter, her lawful guardian, appealed from the decree.

McKinney's appointment, as guardian of Martha, being void he, of course, had no right to intervene nor to appeal from the court's order denying his petition. His attempts to intervene and to appeal were null. Any question he attempted to create became moot when he was held by the Oklahoma Supreme Court to have been illegally appointed and was prohibited. His appeal being from an order denying him leave to intervene and not from the decree,—and Saber's appeal being from an order denying his intervention and not from the decree, such decree remained unappealed from, final and conclusive. Since neither McKinney nor Saber were permitted to get into the case, their appeals could not create a contingency on ownership,—and such appeals could not create a contingency on the payment to Martha by the December, 1920 contract. Thus the error in the Board's conclusion is self-evident.

The Board having correctly found that the 1920 stipulation "awarded the additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), the Secretary's preventing *distribution* until Parmenter consented to modify the decree to direct *distribution* to the Superintendent created no contingencies on *payment.* Such delay merely continued the Receiver as trustee for Martha's additional money—as well as the money decreed to be due her under her valid sale contract—until *distributed* to another trustee. In

the meantime her title to and ownership of the money assigned, relinquished and transferred by the December, 1920 contract was as perfect and free from contingencies as her other money held in trust by the Receiver. The same decree perfected title to both sums of money.

Contingencies on income must be genuine before a taxpayer on the accrual basis is relieved of the duty of reporting such income. Conversely, contingencies on payment must be genuine before a taxpayer may be denied the right to deduct his expenses in determining net taxable income on the accrual basis. Also, contingencies on ownership of property or assets lost must be genuine and not ephemeral, flimsy or fantastic before deduction of such loss may be denied. This is a common sense rule.

The question—of whether payment to Martha Jackson is deductible in the year (1920) the funds were transferred, relinquished and assigned to her, or in the year (1921) the controversy between Parmenter and the Secretary terminated, or in the later year (1922) when actual *distribution* and physical delivery was made by the Receiver, as one trustee, to the Superintendent, as another trustee for Martha Jackson—is answered in petitioner's favor by the facts of the instant case.

After petitioner and his associates, by their December, 1920 contract, assigned, relinquished and transferred to Martha Jackson (not to McKinney, the Secretary, nor Parmenter) the $202,637.84 and conveyed and parted title with, and relinquished all control and dominion over, funds to which they had quieted and perfected title, and of which they had constructive possession, the controversy between Parmenter, McKinney and the Secretary—(subsequently narrowed to a controversy between Parmenter and the Secretary)—instead of creating a contingency *on payment* to Martha Jackson, or her ownership of the money paid— that

controversy, and the attitude of the contestants, refutes any contention or conclusion there was a contingency on *payment* to Martha Jackson. The contestants were all asserting the money paid was hers—and each was asserting his right to administer the money for her. With petitioner *disclaiming*, and Martha's legal representative and the others all *claiming* such money was hers by reason of unconditional transfer, there could be no contingency on *payment*. Certainly the purpose, intention, attitude and acts of Martha's legal representative and the other contestants should determine in the instant case that there was no contingency on such *payment*.

The controversy between McKinney and Parmenter and later between Parmenter and the Secretary was over the right to act in a representative capacity *only* for Martha, and not over a personal claim by one or another of those contestants against such funds. Regardless of which prevailed in, or the time required to settle, that controversy, Martha remained the assignee and transferee and owner of the transferred funds—and such funds were as securely held in trust for her by the Receiver pending settlement of that controversy as they could have been held by Parmenter, or as they were thereafter held by the Superintendent.

When Deductible.

The Secretary's demands being not only acknowledged, —but his "judgment" and order being complied with—regardless of the fact that his "judgment" and order was void, the December, 1920 payment to Martha was not only properly accruable and deductible as expense, in 1920, but also deductible as a loss immediately after the December, 1920 contract had been executed. Such payment was deductible as expense in 1920 in the usual course of business because it was made to prevent further delay in the distribution of the impounded funds, of which petitioner and asso-

ciates were the owners and had constructive possession and for which the Receiver was trustee. *Kornhauser* v. *United States, supra; Bliss* v. *Commissioner, supra; Commissioner* v. *Wurts-Dundas, supra; Lucas* v. *Wofford, supra; Atwater Kent Mfg. Co.* v. *Commissioner, supra; Frank & Seder Co.* v. *Commissioner, supra;* and *Illinois Central Co.* v. *Commissioner, supra.*

The relinquishment of the funds was an immediate loss because petitioner and associates were entitled to distribution of their funds under the final decree of a court of competent and exclusive jurisdiction. Certainly no benefits were derived by petitioner and his associates from the "judgment" and order of the Secretary and his arbitrary acts in enforcing the same. The loss was sustained to avoid the loss incident to a lawsuit with the Secretary to determine the invalidity of his acts in preventing *distribution,* and the further loss of use of such impounded income, and is obviously deductible as a loss in 1920. *Seuffert Bros.* v. *Lucas, supra; F. W. Darling* v. *Commissioner, supra; Dayton Co.* v. *Commissioner, supra; United States* v. *S. S. White Dental Mfg. Co., supra; Commissioner* v. *Brown, supra;* and *Rhodes* v. *Commissioner, supra.*

It was never contemplated in the making of Martha Jackson's sale contract, nor in the later construing contract, nor provided by the court's decree, that there should be distributed to Martha Jackson the consideration for her sale of her unestablished and unadjudicated claim prior to distribution of the impounded funds to the owners, nor that by such earlier distribution Martha Jackson should escape paying one-eighth of the entire receivership administration expenses.

When the Secretary interferred and required that Martha Jackson be relieved of such administration expenses, and those expenses were, by the December, 1920 contract,

assumed and charged to the residue of petitioner's, Brazell's and Johnson's impounded funds, three-eighths of such expenses, *computable as of December, 1920, were properly deductible by petitioner in 1920, on the accrual basis,* notwithstanding the exact amount was not known.

On the *cash basis* three-eighths of Martha's one-eighth of all the expenses actually paid by the Receiver up to January 1, 1921, were, under the December, 1920 contract, properly deductible by petitioner in filing his tentative returns for 1920, *had petitioner been on the cash basis. Being and contending that he was on the accrual basis, three-eighths of one-eighth of the entire receivership administration expenses up to final distribution, including taxes and all other charges charged to Martha Jackson by the final decree, were properly accruable and deductible in 1920 by petitioner in addition to the money transferred directly to Martha Jackson.*

POINT 3.

The Circuit Court's Opinion and Decision herein should be reversed and Propositions I and II should be decided by this Court to eliminate conflict in the Opinion and Decision herein of the Tenth Circuit Court with the opinions of other Circuit Courts of Appeals and of this Court, and to eliminate great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in the construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals.

The foregoing Point 3 is self-demonstrative and requires no elaboration. Should this Court not grant the writ herein prayed for and reverse the Circuit Court's and the Board's decisions herein, the confusion that will result to all taxpayers, to the lower courts, to the Board of Tax Appeals, and to the Bureau of Internal Revenue in the construction and application of the Revenue Acts and Rules

and Regulations is self-evident,—and multiplicity of suits will follow.

Petitioner respectfully urges that the decisions of both the Circuit Court and the Board of Tax Appeals in the instant case should be reversed and the deduction in controversy should be allowed.

Respectfully submitted,

O. O. OWENS, Petitioner,
Pro Se.